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**CITY of DENTON, TEXAS** MUNICIPAL BUILDING / DENTON, TEXAS 76201 / TELEPHONE (817) 566-8200

Office of City Attorney

July 11, 1990

The Honorable Jim Mattox  
Attorney General  
Supreme Court Building  
P.O. Box 12548  
Austin, TX 78711-2548

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Opinion Committee

Re: Request for an Opinion under §7(a) of the Texas Open Records Act, Tex. Rev. Civ. Stat. Ann. art. 6252-17a (Vernon Supp. 1990) (the "Act").

Dear Mr. Mattox:

On July 2, 1990, the City of Denton ("City") received a written request for all records of disciplinary complaints against certain named officers of the Denton Police Department. The open records request was made by Mr. William M. Nelson. A copy of his request is attached as Appendix A.

The City has enclosed for your inspection copies of documents which may satisfy this request. The City believes that all of these records are excepted from disclosure under §3(a)(1) of the Act (information deemed confidential by law) and §3(a)(2) of the Act (personnel files). Other specific exceptions will be raised as they apply. For reasons that will become apparent, the documents have been separated into two groups. Appendix B contains requested documents maintained within the officers' personnel files. Appendix C contains documents maintained by the Department only. ✓

All of these documents are exempted from disclosure under §3(a)(1) of the Act in that public release of these documents is prohibited under Tex. Loc. Gov't Code §143.089 (Vernon Supp. 1990). Section 143.089 is new legislation and, consequently, neither the authority cited within Mr. Nelson's letter nor any other Attorney General's opinions that the City has found have yet examined the Open Records Act in light of this new legislation.<sup>1</sup> The City is

<sup>1</sup> The City has previously raised this argument in another case, yet the merits of the argument were never reached because the records were excepted under the litigation exception.

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not unaware of the narrow interpretation formerly given to §3(a)(2) of the Act in excepting information within personnel files from disclosure. Nevertheless, §143.089, when read in conjunction with §3(a)(1) of the Act, significantly broadens the protections afforded to such matters. Paragraph (f) of §143.089 provides that the contents of an officer's personnel file may not be released without the officer's written permission unless the release is required by law. Paragraph (g) of §143.089 authorizes the police department to maintain a personnel file for the department's use and likewise prohibits disclosure. Unlike paragraph (f), however, paragraph (g) does not provide an "unless required by law" exception to the prohibition of disclosure.

The City believes that the legislative intent behind this distinction may be found within the other provisions of §143.089, specifically paragraphs (b), (c) and (d). These provisions prohibit the inclusion of and mandate the removal of documents relating to investigations which were determined to be unfounded. The legislation is silent on which materials may be contained within the Department's personnel file. Therefore, it can be assumed that the Department is free to include within its own files materials which are prohibited from inclusion within the personnel file. The legislature obviously intended to give the individual officer this additional privacy protection to enjoin the public release of documents relating to unfounded charges, internal investigation reports and evidence, and other documents too sensitive for public release.

The fact that §143.089 of the Local Government Code was created within the same piece of legislation which modified the Open Records Act indicates, in the absence of language to the contrary, that the legislature intended to give equal weight to both. See, Tex. H.B. 1285 (71st Leg. 1989). Neither provision should control the other since both were created or modified by the same legislative act. As a general principle, the Open Records Act mandates disclosure of documents unless otherwise prohibited by law. The Civil Service law §143.089 (f) does the opposite - it prohibits disclosure of specific documents unless otherwise mandated by law.

The only reasonable reconciliation of this apparent "stand-off" lies within the idea the Open Records Act provision embodies a general rule which is subject to a whole laundry-list of specific exceptions. Section 143.089(f) is yet another specific-case exception to the general principle. This solution is also supported by the fact that the Open Records Act creates an exception where disclosure of information contained within personnel files would constitute a clearly unwarranted invasion of

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personal privacy. Act, §3(a)(2). Such a solution would be consistent with the Legislature's recognition of the need for enhanced security when dealing with the records of police officers as opposed to other government employees. See, e.g., Act, §3(a)(17) and §3(a)(19). Further, the Civil Service Act is the more specific and more recent legislative pronouncement of the law of confidentiality with regard to police personnel files. As such, it should control over the Open Records Act. See, Tex. Att'y Gen. ORD-517 (1989). Therefore, the City urges that the conflicting provisions be read to prohibit disclosure of an officer's personnel file even in the face of an otherwise valid open records request.

Since §143.089(g) states its prohibition without the exception contained within §143.098(f), the Open Records Act should not in any way be applicable to the Department's files (Appendix C). There being no controversy, the City urges that those documents contained within the Department's file be excepted from disclosure. ✓

The specific items contained within the Department's files dealing with the investigation of the officers' prior misconduct are likewise not subject to disclosure under the Act because they are analogous to internal affairs documents. Although the Denton Police Department does not have an internal affairs division, per se, the Department does investigate citizen complaints of police misconduct and recommends disciplinary action in the same way as an internal affairs division. The internal affairs division of the Dallas Police Department has been held to be a quasi-judicial body. Putter v. Anderson, 601 S.W. 2d 73, 77 (Tex. Civ. App. - Dallas 1980, writ ref'd n.r.e.). As a quasi-judicial body, an internal affairs division would not subject to the Open Records Act. Act, §2(1)(G). Documents relating to the investigation of police misconduct should therefore be excepted from disclosure. Any of these records which deal with acts constituting crimes would also be excepted from disclosure under §3(a)(8) of the Act. ✓

As part of the investigation into some of the officers' alleged misconduct, a number of protected documents were amassed into investigation files. These documents include case reports, arrest reports, NCIC and TCIC criminal histories, and the like. The Denton Police Department has an obligation to protect the privacy interests of these suspects and arrestees as well as the interests of this particular officer. These documents are excepted from disclosure under §3(a)(8) of the Act. Tex. Att'y Gen. ORD-127 (1976).

Many of the documents within the Department's file consist of inter-agency or intra-agency memoranda consisting of advice, opinions, or recommendations which are used in the deliberative

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process of deciding whether or not to discipline the officers. As such, these documents would be excepted from disclosure under §3(a)(11) of the Act. Tex. Att'y Gen. ORD-334 (1982); ORD-297 (1981). Certain other of the documents are inter-agency memoranda consisting of advice, opinions or recommendations used in the periodic evaluation of the officer which are also excepted under this provision. Tex. Att'y Gen. ORD-450 (1986); ORD-354 (1982).

Many of the documents contained within Appendix C contain the home addresses and home telephone numbers of the police officers. These items are not subject to disclosure and such references have already been deleted. Act, §3(a)(17). Disclosure of many of the items submitted to you from the Department's file would constitute a clearly unwarranted invasion of the officers' personal privacy. Act, §3(a)(2).

We respectfully request that you render an opinion under the provisions of §7(a) of the Act that none of the requested records are not subject to disclosure. Alternatively, we request an opinion that the documents contained within the Department's file (Appendix C) are not subject to disclosure, in keeping with Tex. Loc. Gov't Code §143.089(g). We appreciate your assistance and time in answering this request, and trust that you will let us know if you have any questions.

Respectfully Submitted,

  
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Jerry E. Drake, Jr.  
Assistant City Attorney

enclosures

cc: Michael Jez, Chief of Police, Denton Police Department  
Lloyd V. Harrell, City Manager, City of Denton, Texas  
Thomas W. Klinck, Director of Civil Service and Personnel